(15)

No. 88-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICI CURIAE OF ACTION ALLIANCE OF SENIOR CITIZENS, GRAY PANTHERS, COALITION OF SENIOR ADULTS, AND LEGISLATIVE COUNCIL OF OLDER AMERICANS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The parties submitting this brief amici curiae are petitioners in the case of *Action Alliance of Senior Citizens, et al. v. Sullivan, et al.*, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending (No. 88-849). That case presents a question of whether the Paperwork Reduction Act and its statutory predecessor authorize the Office of Management and Budget to overturn a regulation of the Department of Health and Human Services requiring the disclosure of information by third parties as part of the government-wide enforcement of a civil rights law, the Age Discrimination Act of 1975. That law generally prohibits recipients of federal funds from

discriminating against persons because of their age in the provision of services and benefits, and directs the Department of Health and Human Services to promulgate government-wide regulations to effectuate the law. 42 U.S.C. 6103.

The government recognizes that the challenge to OMB's disapproval in *Action Alliance of Senior Citizens* raises issues related to those in this case, and suggests that the Court hold the *Action Alliance* petition pending resolution of this case. Resp. Br. 6, No. 88-849.

Consent of each party to the filing of this brief amici curiae is presented pursuant to Rule 36.2 of the Supreme Court Rules.

ISSUES PRESENTED

1. Whether a collection of information by an agency subject to review by the Office of Management and Budget under the Paperwork Reduction Act extends to disclosure of information required but not collected by an agency; and

2. Whether OMB authority to disapprove a collection of information by an agency is limited in any respect by the Act's protection for substantive policy entrusted to the agency by law.

SUMMARY OF ARGUMENT

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, by its terms confines review by the Office of Management and Budget (OMB) to a "collection of information by an agency" of the federal government. 44 U.S.C. 3504(c)(2). An extension of this review authority to disclosure, labeling and similar information which may be required, but not collected, by an agency would strain the Act's language and exceed Congress' intent. It would convert the PRA from its stated purpose of regulating the flow of government paperwork to an entirely different purpose of empowering OMB to supersede an agency's determinations of rights and duties among private individuals and the public under laws entrusted by Congress to the agency.

OMB regulations, which purportedly extend OMB authority under the PRA to the kind of disclosure requirements at issue, are inappropriate for judicial deference. The regulations are not a product of OMB's peculiar expertise, but rather represent an assertion of authority over other federal agencies. Under these circumstances the regulations warrant heightened scrutiny.

Even a finding of authority in OMB over a particular information collection does not conclude the inquiry on judicial review. A court must balance the exercise of OMB authority under § 3508 of the PRA with that reserved to the agencies, specifically, each agency's authority over its own "substantive policies and programs" under § 3518(e) and the requirement that OMB authority be exercised "consistent with applicable law" under § 3504(a). Although the PRA creates a certain interagency tension in this regard, its language and legislative history reflect a resolution by allocating to an agency the determination of what information it needs to enforce a statutory mandate and to OMB a responsibility over the manner in which that information is collected. The Court of Appeals recognized this distinction and applied it correctly here.

Finally, the PRA creates an exemption for enforcement of civil rights laws under § 3518(e) which is not observed in practice. It also requires OMB to exercise its authority "consistent with applicable law," § 3504(a), and prohibits resort to the PRA as a method to circumvent agency rulemaking responsibilities under the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* These important limitations in the PRA must be recognized in other litigation pending before the Court.

ARGUMENT

I. OMB REVIEW AUTHORITY UNDER THE PRA DOES NOT EXTEND TO DISCLOSURE OF INFORMATION WHICH IS NOT COLLECTED BY AN AGENCY.

The Court of Appeals correctly ruled that a "collection of information" or "information collection request" under the PRA excludes labeling requirements and disclosures made to the public directly rather than to a federal agency. The language, purpose and legislative history of the PRA support this construction.

The starting point is the statute's investing OMB with authority over "the collection of information *by an agency*," 44 U.S.C. 3504(c)(2), 3508 (emphasis added). The PRA defines "collection of information" to mean "the obtaining or soliciting of facts or opinions *by an agency* . . . ." 44 U.S.C. 3502(4) (emphasis added). That language must be regarded as conclusive absent a clearly expressed legislative intention to the contrary. *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

By enacting the PRA Congress admittedly gave the OMB a broad reach in its oversight of the flow of federal paperwork, and left the outer contours of that reach somewhat murky. Two Congressional concerns appear in the statute and its legislative history which help clarify those contours. On the one hand, Congress desired not to limit the scope of federal paperwork subject to OMB review according to its form. The Senate Committee Report on the PRA noted how "a federal paperwork burden does not depend on how the questions are asked of the respondent, but rather on the fact the Federal government has asked or sponsored the asking of questions." S. Rep. No. 930, 96th Cong. 2d Sess. 39, *reprinted in* [1980] U.S. Code Cong. & Adm. News 6241, 6279 ("Senate Report"). Thus the PRA defines broadly the instruments for collection of information by a federal

agency, including such instruments as reporting and record-keeping requirements.[1]

On the other hand, Congress framed the PRA around the collection of information by the Federal government. *Id.* The statute's own statement of purposes in each instance is tied explicitly to *federal* activity. 44 U.S.C. 3501(1)-(6). The legislative history, while imprecise on this point, suggests a Congressional intent to tie "record-keeping requirements" under the PRA to "a means of soliciting facts or opinions by an agency" and not to cover record-keeping as a free-standing activity of private parties where the agency has no role in transmittal. Senate Report, 38, 40.[2] Congress's intention was more limited:

> As the committee made clear in its report, the only circumstances under which collections of information are considered to be conducted or "sponsored" by a Federal agency are where: First, the agency itself conducts the collection; second, the agency uses a procurement contract to obtain information by way of a contractor; or third, the terms and conditions of a grant or cooperative agreement specifically require

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[1] The government's emphasis on the OMB authority over "information collection requests," including reporting and record-keeping, 44 U.S.C. 3504(c)(1), is misdirected. Pet. Br. 20-21. The PRA defines "information collection request" by enumerating various methods "calling for the collection of information." 44 U.S.C. 3502(11). Such requirements as reporting and record-keeping, therefore, do not stand independently as activities subject to OMB review, but as instruments to be used in the collection of information by an agency under the Act.

[2] Congress anticipated coverage of certain information filed with an agency, such as the Securities and Exchange Commission, for ultimate disclosure to the public rather than for internal statistical use. Senate Report at 39-40. Nonetheless, collection by the agency, or maintenance for future collection triggers PRA coverage; no clear indication of coverage is made for disclosure of information which is not ultimately collected by the agency. *Id.*

that collections of information be subject to the clearance requirements of the act.

126 Cong. Rec. 30,191 (1980) (Remarks of Senator Danforth).

The purpose of the PRA is not served by an extension of its scope to disclosure and labeling requirements. The PRA represents an effort by the federal government to rationalize its own flow of information by ascertaining the need for information and by avoiding duplicative or burdensome requirements in collecting it. Federal information "paperwork" is the element being regulated. This objective is distant from the objective, in the government's view, of empowering OMB to regulate duties and rights among private individuals and the public, especially with laws affecting public health, safety, welfare or civil rights. In this area public protection through disclosure is central to the activity being regulated, and federal paperwork is incidental to it.

The government argues that the PRA covers all federal disclosure requirements, with or without federal agency collection, covering activities as diverse as housing inspections to hearing aids and funeral services. Pet. 18. Under this view, virtually any private party subject to a labelling or a disclosure requirement could challenge that requirement by discovering a data-gathering or recordkeeping chore which the requirement might entail but which lacks the specific imprimatur of OMB. Nothing in the PRA suggests that Congress envisoned OMB's playing so dramatic a role.

The government seeks shelter for its broad view in OMB's own regulations under the PRA[3], asking defer-

[3] OMB regulations list certain statutory exemptions from coverage but omit outright limitations under § 3518(e). 5 C.F.R. 1320.3. The regulations increase OMB authority over a variety of information which is not collected by a federal agency, but which is disclosed to other persons. *See* 5 C.F.R. 1320.7(r) ("record-

ence to them under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Such deference is inappropriate. This Court emphasized in *Chevron* that

> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843 & n.9 (citations omitted). As shown above, Congressional intent differs from the OMB construction and must be given effect here.

Moreover, *Chevron* deference is accorded to an agency's "reasonable accommodation of conflicting policies *that were committed to the agency's care* by the statute" and where "a full understanding of the force of the statutory policy in the given situation has depended on more than ordinary knowledge respecting the matters subjected to agency regulations." 467 U.S. at 844-45 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961) (emphasis added). Here, OMB is not practicing its expertise on technical matters solely within its competence, but is resolving a conflict in authority between itself and other agencies. This resolution falls outside the *Chevron* rationale and invites scrutiny rather than deference.

This principle is illustrated in this case. The Secretary of Labor, in the administration of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. 651 *et seq.*, exempted from the labeling requirement for hazardous materials those products used in the workplace in a manner similar to the way the products would be used by

keeping"), 1320.7(s) ("reporting"), and 1320.7(t) ("sponsor"). These additions are cut from whole cloth and are foreign to the PRA.

consumers and drugs subject to labeling under federal food and drug laws. Pet. App. 10a. This standard serves the central purposes of the underlying statute by enhancing workplace safety. 29 U.S.C. 651(b). Moreover, it imposes no direct obligation on manufacturers to collect information. Any paperwork burden would be slight and incidental to the achievement of the statutory mandate of OSHA.[4]

Nothing in the language or purposes of the PRA history supports the broad definitions of review authority being urged by OMB. The Court of Appeals correctly ruled that disclosure and labeling requirements imposed on a third party do not constitute a "collection of information by an agency." 44 U.S.C. 3504(c)(2).

II. OMB REVIEW MUST BE EXERCISED IN HARMONY WITH SECTION 3518(e) AND MUST BE "CONSISTENT WITH APPLICABLE LAW."

A. The PRA Does not Authorize OMB to Veto an Agency's Determination of What Information Is Necessary to Fulfill its Statutory Mandates.

Even if the PRA applies to disclosure or labeling of information which is not collected by a federal agency, that would not conclude the inquiry here. A reviewing court then must balance OMB authority under § 3504 with an agency's authority over substantive policy under § 3518(e). The Court of Appeals correctly ruled that the PRA does not "allow OMB, in the guise of regulating

[4] This consideration applies as well to the substantive agency policy at issue in *Action Alliance of Senior Citizens v. Sullivan*, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending, No. 88-849. The case involves an agency requirement of record keeping, but not transmittal to the agency, as a pivotal element in the agency's enforcement of a civil rights statute. 43 Fed. Reg. 56,437 (Dec. 1, 1978); 44 Fed. Reg. 33,770 (June 12, 1979). The Court of Appeals incorrectly deemed this to be a collection of information by a federal agency subject to OMB review. 846 F.2d 1453-54.

collection of information, the authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies." Pet. App. 10a.

The language of the PRA allocates to the agencies the authority to determine what information they need for statutory enforcement and allocates to OMB the authority to review the method for collecting that information. It provides that the authority of the Director of OMB "shall be exercised consistent with applicable law," 44 U.S.C. 3504(a), and that "[n]othing in this [Act] shall be interpreted as increasing or decreasing the authority of the [OMB] with respect to the substantive policies and programs of departments, agencies and offices . . . ." 44 U.S.C. 3518(e). However, the PRA also permits OMB to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency . . . ." 44 U.S.C. 3504(c)(2).

The government urges that OMB authority under this section take precedence over the exercise of substantive authority by any agency subject to the PRA. Once OMB review attaches, the argument goes, the OMB determination becomes absolute and final.[5] The OMB determination of what information is "necessary" supercedes the agency's own determination of what is necessary to carry out its statutory duty. Pet. Br. 33.

The government's view of the OMB's authority under section 3504(c)(2) ignores the Act's critical tension between the agencies' independent duties and OMB respons-

[5] The Court of Appeals in *Action Alliance of Senior Citizens*, *supra* n.4, adopted the government's position by confining its inquiry to whether OMB review had involved a "collection of information" under the PRA, and by refusing to read § 3518(e) as imposing any limitations on OMB in the exercise of its authority. 846 F.2d at 1454-55.

ibility. It renders as surplusage the PRA's restraints on OMB authority. Moreover, that view ignores this Court's frequent injunction against reliance on the literal language of a statute where such reliance would defeat the law's plain purpose, *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983), or would not be consistent with the "sense of the thing," *Heckler v. Edwards*, 465 U.S. 870, 879 (1984). The "sense of the thing" under the PRA is not to view it as a Congressional decision to erode other statutory objectives. When Congress enacts a statute and entrusts an agency with its enforcement, Congress cannot be presumed in the PRA to have empowered the OMB to veto any decision by the agency involving information needed for enforcement of other Congressional enactments.

The PRA scheme resolves paperwork review with other law: On the one hand, Congress intended that an agency retain its authority to determine what information is necessary to the effective enforcement of a law entrusted to it. The OMB, on the other hand, can review the method by which that information is collected. In this way the PRA's dual purposes of creating paperwork oversight and maintaining independent agency policy can be harmonized.[6]

However, the PRA does not confer unfettered discretion in OMB to overrule an agency's decision over what information it needs. Rather, it imposes an objective standard of "whether the collection of information is necesary for the proper performance of the function of the

[6] One commentator would resolve the PRA and competing statutory mandates by requiring the OMB on judicial review to demonstrate that practical alternatives to the agency's information gathering exist which are less burdensome to the respondents and yet produce the information the proposing agency deems necessary. Note, *The Paperwork Reduction Act in* United Steelworkers v. Pendergrass: *Undue Restriction and Unrealized Potential*, 89 Colum. L. Rev. 820, 933 (1989).

agency. . ." 44 U.S.C. 3504(c)(2). OMB inquiry is limited to whether the information sought is related to the agency's legitimate functions and, if so, to the manner in which it is collected. It may disapprove a collection which is duplicative, or which is more burdensome than an available alternative or, in all events, OMB can make suggestions short of disapproval.[7] OMB is authorized to review "information" itself, in contrast to its "collection," according to its "practical utility." *Id.* This is a narrow inquiry, however, confined to "the ability of the agency to use the information it collects, particularly the capability to process such information in a timely and useful fashion." 44 U.S.C. 3502(16). Congress did not empower OMB to veto any agency policy, or any agency determination about its need for information, under the aegis of reviewing how that information is collected.

The present case illustrates an OMB disapproval beyond the delineations of the PRA. OMB did not disapprove the OSHA standards at issue because they were unrelated to the "proper performance of the functions" of OSHA. *Id.* Indeed, the standards are central to the agency's statutory responsibilities for ensuring workplace safety under 29 U.S.C. 655. OMB did not find that the information at issue lacked "practical utility" in terms of "the ability of the agency to use the information it collects," 44 U.S.C. 3502(16), because the information at issue is not even being collected by the agency. Instead, OMB rendered its disapproval after substituting its judgment for that of the agency by focusing on the interest of employers regulated under the OSH Act. Pet. Br. 30a-37a. This exceeds OMB responsibilities under the PRA.

An equally glaring substitution of OMB judgment for agency judgment arises in *Action Alliance of Senior Citi-*

[7] OMB authority over agency budget requests assures that such suggestions will not fall on deaf ears. *See* 31 U.S.C. 1101 et seq.

zens, supra n.4. OMB disapproved a self-evaluation requirement imposed on recipients of federal funds in government-wide regulations implementing the Age Discrimination Act, 42 U.S.C. 6101 *et seq.* Although not collected by a federal agency, the self-evaluation would be made available to the agency and to the public for a period of three years. 45 C.F.R. 90.43(b). OMB did not challenge the regulation's relationship under § 3504(c)(2) to the "proper performance of the functions" of the Department of Health and Human Services, which promulgated the rule under 42 U.S.C. 6103(a)(3). Rather, OMB disapproved the regulation, without analysis, because HHS had not demonstrated its practical utility, alternative methods available, and the burden it would impose. Pet. App. 48a-49a, No. 88-849. This exercise by OMB, like that in the present case, ventures well beyond paperwork review and into areas of judgment entrusted by law to the agencies.

Legislative history emphasizes this exemption. Congress adopted § 3518(e) explicitly to limit the authority of OMB over substantive agency policies and programs. The Senate made this clear in its bill at the time of passage of the PRA:

> Section 3518(e) provides that the bill does not affect in any way the powers of the President or OMB respecting the substance of agency policies. Thus [the Senate bill] draws an important distinction between paperwork management and substantive decisions.

Senate Report at 56. *See* 126 Cong. Rec. 30,192 (1980) (Remarks of Senator Javits in floor debates).

Inherent limitations on OMB authority are emphasized by the Act's provision for judicial review of an OMB action disapproving an agency collection request. The PRA proscribes judicial review of an OMB decision "to approve or not to act upon a collection of information requirement" but leaves open to review a decision by

OMB to disapprove such a requirement. 44 U.S.C. 3504(h)(9). This is buttressed by the presumption favoring judicial review absent a Congressional intention to withhold it. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 157 (1970).[8]

B. Section 3518(e) Constitutes an Exemption for the Collection of Information in the Enforcement of Civil Rights Laws.

The PRA enumerates particular exemptions to the OMB authority in review of federal paperwork in specific areas, including the conduct of a federal criminal investigation, a civil action to which the United States is a party, the service of compulsory process, the conduct of intelligence activities, and enforcement of the civil rights laws.[9] These exceptions operate as statutory exemptions independent of the general scope of OMB review under the PRA and the general power of OMB to affect substantive agency policy.

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[8] By contrast, the Regulatory Flexibility Act specifically prohibits all judicial review. 5 U.S.C. 611 (1982). Review of OMB disapproval of an agency's procedure is appropriate under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706 (1982). *See* 89 Colum. L. Rev. at 933-34. This standard permits a greater degree of judicial scrutiny than obtains under traditional deference to the agency's determination, lest OMB be allowed to infringe on mandates of other agencies to an extent not contemplated in the Act, and lest deference to the OMB effectively nullify deference to the original agency in its determination of substantive policy. *Id.* at 936-37.

[9] 44 U.S. 3518. § 3518(e) provides:

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

In another case pending before the Court, OMB is attempting to supercede a statutory exemption. *Action Alliance of Senior Citizens*, *supra* n.4, involves an asserted OMB veto of an information requirement in an agency regulation promulgated explicitly for the purpose of civil rights law enforcement, and which regulation the agency thereafter failed to enforce explicitly on the basis of the PRA. 47 Fed. Reg. 57,852 (1982). Amici, who are petitioners in that case, seek recognition for the statutory exemption for civil rights law enforcement in any interpretation of OMB power under the PRA.

Section 3518(e) reflects Congressional intent to exempt civil rights law enforcement efforts from an OMB veto, although not necessary from OMB comment, in the operation of the PRA. Floor debates on the Senate bill, which added this exemption, affirm this intent.

> Civil rights programs, unlike many of the other programs covered by this bill, are grounded in fundamental constitutional rights. As such, they are entitled to every possible protection from political interference. Further, many of these programs simply cannot be enforced without the collection of data. Even if the information requested may seem burdensome to some, its collection is especially important in the area of civil rights. I have no objection to OMB reviewing information requests from civil rights or any other agencies to assure that the information is collected in the least burdensome manner consistent with the statutory purpose, and is not duplicative. But I will not idly stand by if it appears that any substantive civil rights program is being sacrificed. I do not believe the bill permits this, and that is why I can support it.

126 Cong. Rec. 30,192 (1980) (Remarks of Senator Javits).

These concerns led directly to an amendment to § 3518(e) clarifying the exemption for civil rights law

enforcement as explained by its sponsor, Senator Kennedy.

> As Chairman of the Senate Judiciary Committee—the committee which has primary responsibility for the civil rights laws—I was also concerned about the impact of this legislation on civil rights enforcement. Therefore, I proposed another amendment, which was accepted by the Governmental Affairs Committee, to clarify section 3518(e) to show that nothing in the act will affect the substantive authority and responsibility of the Justice Department and of the Equal Employment Opportunity Commission or any other Federal agency under law or executive order to enforce the civil rights laws of the United States and to supervise the enforcement of the civil rights laws by other departments and agencies of the Federal Government.

126 Cong. Rec. 30,178 (1980) (Remarks of Senator Kennedy). Senator Chiles, the bill's principal sponsor, explained the effect of this amendment:

> In amending the section 3518 exemptions to include civil rights enforcement actions, it should be understood that the scope of the exemption is similar to the scope of the exemptions currently provided in the bill for other enforcement activities. In other words, section 3518, as amended, would make a distinction between specific information collection requests associated with civil rights enforcement actions which would be exempt from OMB review, and other more general information requests by agencies charged with enforcing the civil rights laws, which would still be subject to OMB review. The mere fact that an information request is being issued by an agency charged with enforcing the civil rights laws does not exempt it from OMB review. The key consideration in terms of the section 3518 exemption is that the request itself be related to a specific enforcement action.

Id. (Remarks of Senator Chiles). The House accepted the Senate amendment to § 3518(e). *Id.* at 31,228.

The OMB has chosen to ignore both the plain language of § 3518(e) and the Congressional purpose behind it.[10] Nonetheless, the statute's language must be given full effect: Information collection associated with civil rights enforcement is not subject to OMB disapproval under the PRA.

C. The PRA Does not Authorize OMB to Abrogate Other Law in its Review of Information Collection.

The PRA provides that the authority of the Director of the OMB under the Act shall be exercised "consistent with applicable law." 44 U.S.C. 3504(a). The plain meaning of this text is reinforced by § 3518(e) that the Act does not change OMB authority "with respect to the substantive policies and programs of departments, agencies and offices." In this case the exercise of OMB authority "consistent with applicable law" means, at a minimum, that a federal agency subject to a final court order, directing it to complete rulemaking by a date certain, may not rely on an OMB disapproval under the PRA as grounds to disobey that order.

Similarly, a judicial construction of OMB authority exercised "consistent with applicable law" must recognize that such authority may not operate outside the ambit of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.*, under the PRA or its predecessor. Amendments to the PRA were designed explicitly to withhold OMB authority "to overturn a rule which was adopted by an agency without providing any procedural rights for the people affected by the rule or for the agency" and to withhold

[10] OMB regulations under PRA list other exemptions under § 3518 but omit civil rights law enforcement under § 3518(e). 5 CFR 1320.3 (1983). This omission is unexplained in the rulemaking history. 47 Fed. Reg. 39,519 (1982) (Notice of Proposed Rulemaking); 48 Fed. Reg. 13,665-675 (1983) (final rule).

OMB authority "to overturn that agency decision without even requiring OMB to justify its decision publicly." 126 Cong. Rec. 30,178 (1980) (Remarks of Senator Kennedy.) Thus, the PRA prevents OMB from disapproving a collection request contained in an agency rule unless OMB first comments on the rule and then finds that the agency response is "unreasonable." 44 U.S.C. 3504(h)(5).

The government itself recognizes that existing agency regulations were immune from OMB review following passage of the PRA.[11] However, in litigation the government fails to acknowledge this position, maintaining instead that an OMB disapproval memorandum may operate as a secret rescission of a published agency rule. In *Action Alliance of Senior Citizens, supra* n.4, the OMB disapproved a final regulation of the Department of Health and Human Services in its enforcement of the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.* The OMB disapproval came in an unpublished memorandum dated February 14, 1980,[12] eight months after

[11] An Opinion of the Office of Legal Counsel in the Justice Department concluded that existing regulations were immune from review but that OMB could initiate proposals for changes in regulations and agency procedures under 44 U.S.C. 3504(b)(2). The OMB used this authority to direct agencies to initiate new rulemakings over certain information collections. 89 Col. L. Rev. at 928 & n.63. Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harv. J. on Legis. 1, 45 & n.248 (1987).

[12] The date of the OMB disapproval memorandum on February 14, 1980, prior to the effective date of the PRA on April 1, 1981, 44 U.S.C. 3501 note, is not consequential to its analysis under PRA standards. HHS referred only to the PRA when it first announced its abandonment of the self-evaluation requirement in its own regulation. 47 Fed. Reg. 57,852 (1982). Both the PRA and its predecessor, the Federal Reports Act, 44 U.S.C. 3501 (1976), deal with the collection of information by federal agencies, the scope of which remained the same under both statutes. Senate Report at 39. The substantive authority of OMB remains the same under both laws. 846 F.2d at 1453.

publication of the HHS final rule. 846 F.2d at 1453. HHS did not formally rescind this regulation but simply refused to enforce it, supplying public notice of its action for the first time nearly three years later in a one-sentence reference to the PRA. 47 Fed. Reg. 57,858 (December 28, 1982).

The requirement that OMB review the flow of federal paperwork "consistent with applicable law" serves an important Congressional purpose. To secure this purpose, OMB authority must be construed in a manner which preserves the integrity of both judicial and administrative procedures enshrined in other law.

CONCLUSION

This Court should affirm the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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